United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2679

ORIGINAL

To be argued by
ROBERT LEIGHTON

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

VICTOR VANCIER,

Appellant.

On Appeal from the United States District Court of the Southern District of New York

BRIEF AND APPENDICES FOR APPELLANT

ROBERT LEIGHTON
Attorney for Appellant
15 Park Row
New York, New York 10038
(212) CO 7-6016

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

APPELLEE, :

-against- : DOCKET NO.: 74-2679

VICTOR VANCIER, :

APPELLANT.:

----------x

STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered December 6, 1974 in the United States District Court for the Southern District of New York (Wyatt, J.) adjudicating Appellant Vancier after a non-jury trial of being a juvenile delinquent based on the underlying charge that he willfully attempted to damage property belonging to a foreign official in violation of Title 18 U.S.C. Sec. 970 and 2. Appellant Vancier was committed to the custody of United States Attorney General for a period of two months.

QUESTION PRESENTED

WHETHER THE GOVERNMENT'S CERTIFICATION TO THE DISTRICT COURT WAS IN CONTRAVENTION OF TITLE 18 U.S.C. SEC. 5032 AS THE NEW YORK STATE COURTS HAVE AVAILABLE PROGRAMS SUFFICIENT FOR THE NEEDS OF 17-YEAR-OLD OFFENDERS AND AS THE STATE OF NEW YORK DID NOT RELINQUISH ITS JURISDICTION OVER APPELLANT.

STATEMENT OF FACTS

Appellant Vancier and his co-defendant, Stanley Spirn, were charged in an information with the willful attempt to damage property belonging to and utilized by a foreign official in violation of Title 18 U.S.C. Sections 970 and 2.*

On August 16, 1974, before the Hon. Inzer B. Wyatt, Appellant claimed that he had a right to a jury trial notwithstanding that he was to be tried under the Federal Juvenile Delinquency Act. [18 U.S.C. Section 5031 et seq.] Counsel pointed out that the former statute [18 U.S.C. Sec. 5033] specifically stated that a juvenile did not have a right to a jury trial. However, under the revised statute, which was effective as of September 7, 1974, Congress specifically omitted any reference to a jury trial. Therefore, counsel claimed that Congress now intended that juveniles should have the right to a jury trial. The court ruled that juveniles did not have a constitutional right to a jury trial since the proceedings were not criminal in nature and therefore denied the application. Subject to the aforementioned objections, Appellant consented to proceed as a juvenile. (min. of 11/6/74, pp. 8-10).

Before commencement of the trial, counsel requested an adjournment in order that the Second Circuit could decide whether the federal courts had jurisdiction in this case. (min. of 11/11/74, p. 2) Counsel argued that under Title 18 Section

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*The information is set forth in the Appendix, A.3.

5032 the federal courts cannot proceed against a juvenile until the Attorney General certifies that the state courts do not have jurisdiction, refuses to assume jurisdiction, or do not have available programs appropriate for the needs of juveniles. Counsel then challenged the Government's certification in this case claiming that the New York state courts do have special provisions for youthful offenders between the ages of 16 through 18 which are similar in nature to the treatment of juveniles by the federal courts. Counsel therefore requested a finding that there was an adequate state forum that would have jurisdiction of the matter and therefore the certification by the Government was improper.*

In oppostion to Appellant's application, the Government's position was set forth in a letter to the court dated November 5, 1974.** The Government stated that Appellant had initially been arrested by the New York City Police officers and charged with criminal mischief in the fourth degree in the New York City Criminal Court in Manhattan. On May 24, 1974, a complaint based on the same incident was filed against Appellant in the District Court for the Southern District of New York charging him with acts of juvenile delinquency. Thereafter, on August 20, 1974, the New York City Criminal Court in Part YP3, after having been informed of the pending federal proceedings against Appellant, adjourned the state criminal proceedings "in contemplation of

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* The Government's certification is set forth in the Appendix, A.4-5.

** This letter is set forth in its entirety in the Appendix, A. 6-15.

dismissal". [see N.Y.C.P.L. Section 170.55] According to the Government, the dismissal will occur automatically in February of 1975 unless the New York District Attorney's office seeks to reactivate the proceedings.

The Government in this letter maintained that the State of New York did not have jurisdiction over Appellant and it was the congressional intent when it stated that juveniles ought to be surrendered to the state when an "appropriate" court has jurisdiction means that the state court's procedures and policies must be comparable to the federal juvenile procedures and policies. According to the Government, the character of the proceedings in the New York State family courts are in most respects similar to the proceedings in the federal courts under the Federal Juvenile Delinquency Act. However, the New York family court's jurisdiction extends only to persons under 16 years of age when the acts occurred and as Appellant was 17 years of age, there was no "appropriate" court to which to surrender 17-year-old juveniles charged with acts of federal juvenile delinquency.

Finally, the Government maintained that the Youthful Offender treatment offered by New York for this age group is primarily a sentencing provision.

The court refused to review the certification although counsel insisted that without a proper certification, the court would not have jurisdiction over the case. (min. of 11/6/74, pp. 3-10).*

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* These pages are set forth in Appendix, A. 16-24.

THE TRIAL

On May 24, at 4:30 a.m., Patrolmen Brian Abernathy and John W. Sullivan were in an unmarked vehicle proceeding southbound on Lexington Avenue at 68th Street. (11)* They first observed two individuals sitting in a light-colored Pontiac which was parked at the curb. After making a right turn into 68th Street and turning off their lights, the officers observed Appellant standing outside of the car talking to a person later identified as Spirn who was sitting in the driver's seat of the car. Appellant then poured a liquid on a car directly in front on the Pontiac. (15) This car, a Plymouth Duster, had diplomatic plates, DPL595 (16) A marked police car arrived at the scene and both Appellant and Spirn were apprehended. (19)

SOL KUTTNER, an official employed by the United States State Department explained that his office performs the function of obtaining diplomatic plates for diplomats associated with the United Nations. He described the procedure as follows:

> We receive the request for privileges and immunities from the United Nations for transmittal to the State Department. When the State Department has either approved or not approved a request, they send the documents through the United Nations Mission. We then distribute the documents containing the affirmations of privileges and immunities to the respective diplomats.

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* Numerical references refer to the pages of the trial transcript dated November 11, 1974.

> With regard to diplomatic license plates, we receive the requests from missions to the United Nations. We transmit the requests to the New York Department of Motor Vehicles and when we receive the license plates, we give them to the individual diplomats concerned.
>
> We certify incidentally, when we make our request to the Department of Motor vehicles that the individual diplomat has privileges and immunities and it is on that basis we get the plates. (41)

According to Kuttner, license DPL595 was issued in the name of Vladimir Yezhov on May 10, 1974. (47) He did not personally know Mr. Yezhov and obtained his information concerning this man only from a letter submitted by the foreign country to his office.

According to Kuttner, they knew that Mr. Yezhov was employed by the Russian Goverrment since they had to issue him a visa when he was assigned to the mission. (45) Additionally, when he arrived in the United States, the Department of Immigration notified them and a letter from the Russian Government was sent to the United Nations Chief of Protocol who then informed the State Department of the new arrival. (46)

The witness could not positively state whether Mr. Yezhov was in the United States on May 24, 1974, nor did he ever see him drive the car in question. (57)

At the close of the Government's case, counsel argued that the Government had the burden of showing that Yezhov was actually physically present in the United States at the time the crime was committed. According to counsel, if he were not present, only the state would have jurisdiction.

The court disagreed and stated that it could be inferred that Mr. Yezhov was in New York. The court then remarked "People who own automobiles don't leave them parked on the street if they are back in Russia." (94)

At the conclusion of the entire case, Appellant was adjudicated a juvenile delinquent.

ARGUMENT
POINT I

AS THE NEW YORK STATE COURTS HAVE AVAILABLE PROGRAMS SUFFICIENT FOR THE NEEDS OF 17-YEAR-OLD OFFENDERS AND AS THE STATE OF NEW YORK DID NOT RELINQUISH ITS JURISDICTION OVER APPELLANT, THE GOVERNMENT'S CERTIFICATION TO THE DISTRICT COURT WAS IN CONTRAVENTION OF TITLE 18 U.S.C. SEC. 5032, THEREBY REQUIRING THE VACATUR OF APPELLANT'S ADJUDICATION OF JUVENILE DELINQUENCY.

There is no question but that the Government's certification to the District Court that New York State courts did not have appropriate programs for 17-year-old offenders was clearly erroneous. Appellant aptly pointed out that New York State's treatment of 17-year-olds as youthful offenders was, for all effective purposes, similar in nature to the Federal Juvenile Delinquency Act. At the very least, the court below should have ordered a hearing to resolve this factual issue and its failure to do so requires the reversal of Appellant's juvenile delinquency adjudication.

Title 18 U.S.C. Sec. 5032 specifically mandates that before any court of the United States can proceed against a juvenile accused of committing an act of juvenile delinquency, the Attorney General must certify to an appropriate district court "that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles".

New York State's youthful offender program for 17-year-olds is similar both in nature and substance to the Federal Juvenile Delinquency program.

First, the Government in its memorandum to the court below classified New York's youthful offender program as merely a sentencing procedure. Section 720.10 (5) of N.Y.C.P.L. belies the Government's contention. This section defines a "youthful offender adjudication" as comprising "a youthful offender finding and the youthful offender sentence imposed thereon and is completed by imposition and entry of the youthful offender's sentence". Thus, contrary to the Government's assertion, the sentencing procedure is only the last step in the youthful offender adjudication which is preceded by a fact-finding process.

Moreover, as does the federal statute, the New York statute also provides safeguards which insure a reasonable amount of secrecy surrounding all the proceedings. Even though the New York statutory scheme postpones the actual youthful offender classification until after a criminal conviction has occurred, the "sealing" and privacy provisions begin to operate at the very outset of a criminal action against any defendant who is potentially of youthful offender status. Thus, N.Y.C.P.L. Section 720.15 (1) provides that when any accusatory instrument is brought against any apparently eligible youth, the court must order that it be filed as a sealed instrument. Further privacy is insured when the court in its discretion and with the defendant's consent may order that the proceedings be conducted in private and even if a jury trial of

such a youth be had, the jurors must be given stringent instructions not to reveal to anyone the identity of the defendant, the crime charged against him, or the crime of which he may be convicted. (see N.Y.C.P.L. Sec. 720.15 [2] [3]) Hence, for all practical purposes the New York statutory scheme goes even further than the federal scheme in avoiding stigmatizing the youth as a criminal. Title 18 U.S.C. Sec. 5038 provides only for the sealing of the records and does not in any way insure the privacy of the proceedings itself.

Finally, it must be pointed out that a youthful offender adjudication is not a judgment of conviction for a crime and does not in any way operate as a disqualification of any person so adjudged to hold public office, public employment, or to receive any license granted by public authority. (see N.Y.C.P.L. Sec. 720.35 [1]) No stigma whatsoever attaches to such an adjudication.

In the present case, as Appellant had been charged with only a misdemeanor and as he had no prior convictions, the state would have been obliged to adjudicate him a youthful offender had a conviction been obtained. (see N.Y.C.P.L. Sec. 720.20 [1] [6]) Since Appellant would have received all the benefits accruing to one adjudicated a youthful offender and since such benefits are similar in nature to those granted juveniles in the federal court, the Government's certification to the district

court that New York State did not have appropriate programs to deal with 17-year-old offenders was clearly without basis.*

The court below did not even inquire into the merits of Appellant's allegation that the New York State Youthful Offender program was in fact both an appropriate and effective means of dealing with 17-year-old offenders. The court was of the opinion that it was without jurisdiction to question the Government's certification. Such a conclusion contravenes the very purpose of Title 18 U.S.C. Section 5033. Under this section, it is incumbent upon the district court to inquire into the propriety of such a certification and to inquire even further whether such a transfer would be in the best interest of the juvenile. This section in pertinent part provides:

> Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice; the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's responses to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

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* Contrary to the Government's assertions in the court below, the only marked difference between New York State's Youthful Offender program and its Family Court treatment of juveniles is the form of the final dispositional proceeding (i.e., sentence). The Family Court's sentencing procedure is in the format of a dispositional hearing with testimony actually being taken and witnesses sworn. The sentencing procedures for youthful offenders, however, are almost identical to federal juvenile delinquency sentencing proceedings. In fact, in this case, no difference between the two proceedings can be discerned.

In this case, not only did the court below fail to consider any of the above enumerated factors but no finding whatsoever was entered on this record that the transfer from the State court to the Federal court would be in Appellant's best interest. The failure of the court to conduct any such fact-finding hearing should in and of itself require the reversal of Appellant's adjudication. Instead, the court simply accepted the conclusory statement in the Government's certification that New York State Court lacked proper facilities for dealing with its 17-year-old offenders.

Furthermore, it was not within the contemplation of Congress that a juvenile would be subjected to both Federal and State prosecutions for his alleged criminal acts. Yet, that is precisely what occurred in this case. Appellant has been subjected to double punishment. His State case was not terminated by the Federal proceedings as the State Court of New York never relinquished its jurisdiction of him.

On August 20, 1974, Appellant's case in the New York Criminal Court was adjourned "in contemplation of dismissal" in accordance with N.Y.C.P.L. Section 170.55 (2). This section provides:

> An adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice. Upon issuing such an order, the court must release the defendant on his own recognizance. Upon application of the people, made at any time not more than six months after the issuance of

> such order, the court must restore the case to the calendar and the action must thereupon proceed. If the case is not so restored within such six months period, the accusatory instrument is, at the expiration of such period, deemed to have been dismissed by the court in furtherance of justice.

Thus, an adjournment in contemplation of dismissal is probationary and may be revoked only upon a showing of subsequent misbehavior. See People v. Pomerantz, 76 Misc. 2d 766 (Crim. Ct., N.Y. Cty, 1974). Once the District Attorney chooses to consent to an ACD, a benefit is conferred on the defendant, thereby creating a right (or privilege) to have his case dismissed within a specified time. (six months) Hence, adjournment in contemplation of an ultimate dismissal confers a right upon a defendant analogous to that granted by probation or parole. Having thus acquired that right or benefit, it cannot be taken away without due process of law. Goldberg v. Kelly, 397 U.S. 254 (1970)

Thus, as the State court had retained its jurisdiction over Appellant and did in fact ultimately dispose of the case in accordance with State law, there was never any true transfer of the case from the State court to the Federal court as contemplated by Title 18 U.S.C. Sec. 5032. Each court reached its own disposition and Appellant was in fact subjected to double punishment. In fact, this entire record indicates that the Government's sole intent was to prosecute Appellant for his alleged criminal acts and was not to confer any benefit upon him pursuant to the Federal Juvenile Delinquency Act.

Consequently, as no finding was made by the court below that the transfer to the federal court would be in Appellant's best interest, as New York State did have proper facilities to deal with its 17-year-old offenders, and as New York State retained its jurisdiction over Appellant and reached a final disposition on his case, it must be found that the Government's certification to the District Court was erroneous, thereby requiring the reversal of Appellant's juvenile delinquency adjudication.

CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT'S ADJUDICATION AS A JUVENILE DELINQUENT SHOULD BE REVERSED AND THE INFORMATION DISMISSED.

February, 1975

RESPECTFULLY SUBMITTED,

ROBERT LEIGHTON
Attorney for Appellant
15 Park Row
New York, N.Y. 10013
(212) CO7-6016

D. C. Form No. 100

CRIMINAL DOCKET

JUDGE WYATT

DOCKET sheets

74 [illegible] 918 A-1

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	Steven A. Schatten AUSA 264-6435
VICTOR VANCIER	
	For Defendant:

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED	DISBURSED	
(12)							
Fine,							
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court, 18							
Witnesses 5031-5037							
UVENILE DELINQUENT							
maging property located							
thin the U.S.A.							
(One Count)							

DATE	PROCEEDINGS
-16-74	Filed Information and consent to trial pursuant to the terms of the Federal Juvenile Delinquency Act (Title 18 Sections 5031,et seq.) Deft. (Atty. Present) denies charges on information, Released on his own Recognizance. Trial date set for Nov.11,1974. Wyatt,J.
-26-74	Marked Off.....Conner,J.
1-6-74	Pre-Trial conference held.....Wyatt,J.
11-11-74	Filed Govt's. certification that a juvenile court or other appropriate court of the State of New York does not have jurisdiction over the deft. with respect to the

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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
11-11-74	Trial begun & concluded (Govt-JoAnn Harris, Deft.-Robert Leighton, Esq.) Deft. adjudicated a Juvenile Delinquent. Hearing on Dec.6, 1974 2:30 P.M. Pre-Sentence Investigation ordered. R.O.R.....Wyatt,J.		
12-6-74	VICTOR VANCIER-Filed JUDGMENT and COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) MONTHS, as a Juvenile Delinquent, pursuant to Title 18, 5037 (b) as amended by the new act. (Pub Law 93-415 Section 507.) Deft. continued released on his own recognizance pending appeal. The court orders commitment to the custody of the Attorney General and recommends, that the juvenile delinquent be placed and retained as provided in 18, U.S.C. Section 5039.....Wyatt,J. Issued commitment 12-12-74.		
12-6-74	VICTOR VANCIER-Filed CJA Form 23, deft's. financial affidavit.		
12-6-74	Filed deft's, notice of appeal from the Judgment of 12-6-74 and MEMO ENDORSED: Leave to proceed on appeal in forma pauperis, Granted. SO ORDERED.....Wyatt,J. Mailed notice to: Victor Vancier, 75-20 Utopia P'kway.,Queens, N.Y. and U.S. Attorney's Office.		

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INFORMATION

SAS:ilf
n-823

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

UNITED STATES OF AMERICA,

-v-

VICTOR VANCIER,

Defendant.

---x

INFORMATION

74 Cr.

The United States Attorney charges:

On or about the 24th day of May, 1974, in the Southern District of New York, VICTOR VANCIER, the defendant, did commit acts of juvenile delinquency, in that, being at that time less than eighteen years of age, he unlawfully, wilfully and knowingly did attempt to injure, damage and destroy property located within the United States, to wit, a 1974 Plymouth automobile, and belonging to and utilized by a foreign official and official guest, to wit, Vladimir Yezhov, attache with the Permanent Mission of the Soviet Socialist Republics to the United Nations, in violation of Title 18, United States Code, Sections 970 and 2.

(Title 18, United States Code, Sections 5031 5037).

PAUL J. CURRAN
United States Attorney

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CERTIFICATION

JH:ml
74-1675

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA	:	
-against-	:	CERTIFICATION OF THE UNITED STATES ATTORNEY
VICTOR VANCIER,	:	74 Cr. 813
Defendant.	:	

- x

Pursuant to the provisions of Public Law No. 93-415, Section 502 (September 7, 1974), amending Title 18, United States Code, Section 5032, and,

Pursuant to the authority delegated by Order of the Attorney General of the United States, No. 579-74, dated October 16, 1974, and Memorandum of the Assistant Attorney General, No. 801, dated October 30, 1974, and after due investigation,

PAUL J. CURRAN, United States Attorney for the Southern District of New York, hereby certifies that a juvenile court or other appropriate court of the State of New York does not have jurisdiction over Victor Vancier with respect to the alleged act of juvenile delinquency charged in an Information, 74 Cr. 813, filed against him on

A 5

JH:ml
74-1675

August 16, 1974, in the United States District Court for the Southern District of New York.

PAUL J. CURRAN
United States Attorney
Southern District of New York

Dated: New York, New York
November 8, 1974.

GOVERNMENT'S OPPOSING MEMORANDUM

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JMH:bg

74-1675
d-431

November 5, 1974

The Hon. Inzer B. Wyatt
United States District Judge
Room 1201
United States Court House
Foley Square
New York, New York 10007

Re: United States v. Vancier
74 Cr. 813 (IBW)

Dear Judge Wyatt:

Last week I called your Law Clerk, Mr. Peter Burns, and in Mr. Robert Leighton's absence, one of his associates, and communicated the Government's position with respect to the impact of the Juvenile Justice and Delinquency Prevention Act of 1974 (P.L. 93-415, effective Sept. 7, 1974) on the above captioned proceeding. Briefly, the Government intends to certify Victor Vancier under the provisions of the new Act, and further, contends that the Act does not confer a right to a jury trial in federal juvenile proceedings.

Mr. Burns suggested that a letter setting forth the Government's position in somewhat more detail might be useful. That is my purpose here.

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FACTS

1. On May 24, 1974, Victor Vancier -- then 17 years of age (D.O.B., Dec. 25, 1956) -- was arrested by New York City police officers, and charged, with a co-defendant, with Criminal Mischief in the 4th Degree on a complaint filed in the New York City Criminal court, Manhattan. The crime charged is a Class A Misdemeanor under New York law. N.Y. Penal L. §145.00. The underlying factual allegations were that Vancier poured gasoline on a parked car, aided by the co-defendant who sat in a nearby car.

2. On May 24, 1974, a complaint based on the same incident was filed against Vancier in the S.D.N.Y., charging acts of juvenile delinquency. The underlying adult charge was Attempted Damage of Foreign Diplomat's Property, a violation of 18 U.S.C. §§970 and 2.

3. On July 15, 1974, in the S.D.N.Y., both Vancier and his co-defendant were indicted for violations of 18 U.S.C. §§970 and 2.

4. On August 16, 1974, Vancier signed a consent to be proceeded against as a juvenile under the then effective provisions of 18 U.S.C. §§5032-5033. An information charging acts of juvenile delinquency was filed on the same date.

5. On August 20, 1974, in Part YP3 of the New York City Criminal Court, Manhattan, the court, having been informed of the pending federal proceedings against Vancier, adjourned the state criminal proceeding "in contemplation of dismissal." N.Y.C.P.L. §170.55. This dismissal will occur automatically in February of 1975, unless the District Attorney reactivates the proceeding.

CERTIFICATION FOR FEDERAL PROCEEDINGS

The Government intends to file a certification stating that "the juvenile court or other appropriate

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court" of the State of New York does not have jurisdiction over Vancier with respect to the act of juvenile delinquency which is the basis of the information presently pending before Your Honor.

It is the Government's position that when Congress said, in effect, that juveniles ought to be surrendered to the state when an "appropriate" court has jurisdiction, it meant a court with procedures and policies comparable to federal juvenile procedures and policies. In the New York context that "appropriate" court is the Family Court which has jurisdiction over "Proceedings Concerning Juvenile Delinquency . . ." N.Y. Family Court Act, §§ 711 et seq.

The character of the proceedings in the New York Family Court are in most respects similar to juvenile proceedings in the federal courts under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031 et seq., particularly as amended by the new Act of 1974. In both instances the proceedings are based upon a non-criminal accusatory instrument and are non-criminal in nature. Both proceedings occur in two-parts, an adjudication stage and a disposition stage. The disposition alternatives are essentially the same, except that the state

court has a local placement alternative not available to the federal court. In both the juvenile is provided with certain basic due process rights balanced with equally strong protective policies which reflect, idealistically at least, the aspects of "fairness, of concern, of sympathy, and of paternal attention" which the Supreme Court has characterized as inherent in the juvenile court system. McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971). Also compare the New York and federal acts with "Summary and Parallel Table of Model Codes and Recommendations Concerning Juvenile and Family Justice Systems," Hearings on S. 3148 and S. 821 Before the Subcomm. To Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess., 93d Cong., 1st Sess. at 827-927 (1972-73)("Hearings").

However, there is one pertinent difference between these two juvenile forums. Federal juvenile jurisdiction extends to persons under 18 years of age at the time the alleged acts occurred. New York State juvenile jurisdiction extends to persons under 16 years of age when the alleged acts occurred. Everyone over 15 accused of a crime within New York State jurisdiction is prosecuted in a criminal proceeding, on a criminal accusatory instrument. As a result, in the view of the

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Government, there is no "appropriate" court to which to surrender 16 and 17 year olds charged with acts of federal juvenile delinquency.

This general proposition is applicable to this case. Victor Vancier was 17 when the acts he is alleged to have committed occurred.

In opposition, it could be argued that for persons 16 and 17 years of age, New York's Youthful Offender procedures come into play in the state criminal courts and provide at least a modicum of protective juvenile trappings. N.Y.C.P.L. §§ 720 et seq. This procedure, which finds its federal parallel in the Youth Corrections Act, 18 U.S.C. §§ 5006, et seq., is, in fact, a sentencing provision. The Supreme Court has emphasized that one of the distinguishing aspects of the juvenile system is not in the disposition stage, but in the adjudication stage, where the system takes the juvenile out of the clamor of the adversary system and provides at least the possibility of an intimate, informal, protective proceeding. McKeiver v. Pennsylvania, supra, 403 U.S. at 545, 550. In New York, Youth Offenders are tried in the adjudication stage as adults on criminal accustory instruments in the criminal courts. See, United States ex rel Robert

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d-431

Murray v. Owens, 465 F.2d 289 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973).

Given these considerations, it cannot be said that proceedings under the New York Youthful Offender provisions cloak the New York Criminal Courts with "appropriate" jurisdiction over a person charged in federal court with acts of juvenile delinquency.

Since it is clearly the intent of Congress that 16 and 17 year olds in the federal system be afforded juvenile treatment, it is fair to infer that Congress could not have meant to preclude the same persons from such treatment merely because the state criminal courts have jurisdiction. These young people are, the Government submits, certifiable under the provisions of the new Act.

JURY TRIALS

With the new amendments, Congress has eliminated the language of old §5033 which provided that the "proceeding shall be without a jury," and the language which deemed the consent to be proceeded against as a juvenile to be a waiver of jury trial. No mention of a jury trial one way or the other is in the Act as amended.

The Government contends that by its silence Congress did not intend to confer the right to a jury

trial in federal juvenile proceedings. On the contrary, it would appear that the elimination of the consent and waiver language is an implicit recognition of recent developments in the decisional law which indicate that a jury trial is not constitutionally required, or even philosophically desired, for juvenile proceedings. See, McKeiver v. Pennsylvania, supra; United States v. Anibal Torres, #73-2493, Slip Op., 2d Cir., June 14, 1974. Obviously, if a jury trial is not constitutionally required, the consent and waiver provisions were anomalous, and were eliminated in the process of formulating wholly new procedures for establishing who will be afforded juvenile treatment, and how.

Two aspects of the new Act support this proposition.

1. Legislative materials, though sparse on this subject, indicate a subcommittee concern about setting forth, explicitly, certain constitutional rights. For instance, an early draft of the Act contained the following language:

> "§5033. Jurisdiction and constitutional safeguards . . . A juvenile . . . shall be accorded the constitutional rights guaranteed an adult in a criminal prosecution

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d-431

against unreasonable searches and seizures, against self incrimination and against cruel and unusual punishment."

A later draft contained a special section devoted to rights.

"§5037. Rights in general. A juvenile ... shall be accorded the constitutional rights guaranteed an adult in a criminal prosecution, with the exception of indictment by grand jury. Public trial shall be limited to members of the press, who may attend only on condition that they not disclose information that could reasonably be expected to reveal the identity of the alleged delinquent ..."

"Hearings," supra, at 320.

The first version rather clearly did not contemplate trial by jury; the language of the second version is broad enough to include it, although in some 785 pages of testimony this proposed section was never characterized as including that right. See also, S. Rep. No. 93-1011, 93d Cong., 2nd Sess. (1974) reprinted, U.S.Code Cong. and Admin. News, Oct. ~~31~~ 15, 1974, at 4235. In fact, in those hundreds of pages of testimony the subject appears to have arisen only once when Senator Bayh, the chief sponsor of the Act, asked Mr. Justice Tom Clark to comment on the McKeiver case, and Mr. Justice Clark replied, ". . . as presently constituted

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the juvenile system would not be improved by imposing the requirement of a jury upon it." "Hearings," supra. at 213.

In any event, in the final version, although the Act provided several explicit due process rights, no version of the "general rights" section was included. This was explained by Senator Bayh in his remarks to the Senate prior to the final vote. He said:

> "The title guaranteeing a juvenile all the rights of an adult in a criminal trial has been deleted with out any suggestion that such deletion implies that the rights of juveniles are necessarily less extensive than those of adults in a criminal trial. It is simply a conclusion that at this time decisions of the rights of a juvenile should be decided on a case by case basis under the Constitution. In accordance with this view, for example, it has been held that trial by jury is not constitutionally required in juvenile proceedings."
>
> 120 Cong. Rec. S13492 (daily ed. 7/25/74.)

The implications would appear to be clear. Congress was aware of the state of the law with respect to juvenile rights, and particularly with respect to the line of cases which have held there is no right to trial by jury in a juvenile proceeding. Congress was also aware of contemporary efforts in the area of model

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legislation which uniformly have provided for a non-jury juvenile proceeding. See, Summary of Model Acts, "Hearings," supra, at 827-927. Although nothing prevented Congress from explicitly providing for trial by jury in federal juvenile proceedings, Congress deferred to the courts and the experts in the area.

2. The language of the amendments, also supports the proposition that Congress intended no jury trial. It retained the language in the old §5032 which stated that ". . . the Court may be convened . . . in chambers or otherwise." Since Congress, most likely, did not contemplate that a jury trial could be held in chambers, it appears that with the retention of the language, Congress intended to continue the protective nature of federal juvenile proceedings, without a jury trial.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: _____
JO ANN HARRIS
Assistant United States Attorney
Telephone: (212) 791-1951

cc: Robert Leighton, Esq.
Attorney for defendant
15 Park Row
New York, New York

DISCUSSION LEADING TO DENIAL OF APPELLANT'S APPLICATION CONTESTING THE PROPRIETY OF THE GOVERNMENT'S CERTIFICATION

gtesb

THE COURT: I haven't had a chance to study Miss Harris' letter in detail, but I have read it and I must say it is a thoroughly good piece of work and I wish everyday I could get anything as complete and betraying the marks of hard work as this. I think it is a very, very excellent presentation.

What does the defendant have to say about it? You have seen this?

MR. LEIGHTON: Yes, your Honor. I was able to obtain a copy of the letter earlier today and I have read it.

THE COURT: Don't you agree it is very good, whether you agree with it or not? It is a good piece of professional work.

MR. LEIGHTON: I am in complete accord, your Honor.

However, one exception that I do have to the contents is that although I have not read the legislative enactment as written, I did read the arguments put forth by Miss Harris, and I would say although the New York State Courts in their juvenile proceeding, if we limit the words "juvenile proceedings" to those two words, there is no state procedure existing now to cover Mr. Vancier at the age of 16 as a juvenile proceeding.

jurisdiction.

MISS HARRIS: That's correct, your Honor.

THE COURT: Do we have the text of the new law?

MISS HARRIS: I have the text here if your Honor wants it.

THE COURT: My law clerk has it.

MISS HARRIS: My point is that no appropriate court has jurisdiction.

THE COURT: Wait. If the Attorney General certifies in the language of the statute that the Juvenile Court or other appropriate court does not have jurisdiction -- is that the proposed certification?

MISS HARRIS: That is the proposed certification.

THE COURT: I am afraid that ends the matter, doesn't it?

MR. LEIGHTON: Your Honor, I don't think the Attorney General can arbitrarily say to you, who has to make the final determination, that there is no adequate state forum. I think your Honor has the last word to say --

THE COURT: No. I am sure that Miss Harris is going to say that the certification is in the language of the statute. She is going to have it in the language of the statute.

The law passed by Congress, I think, means that the certification of the Attorney General finishes the matter.

It doesn't mean that I am going to then have a hearing to determine whether to set aside the Attorney General's certification. That, I am confident, cannot be the intent of Congress.

So I think clearly I have to rule -- has the certification been filed?

MISS HARRIS: It has not been filed, your Honor. We are dealing with a new act, as you know.

THE COURT: But presumably it will be filed on or before November 11th, when the trial starts?

MISS HARRIS: That's correct.

There is something I should inform you of. I now have the documents; I am sorry I didn't have them this morning.

The authority to certify has been delegated pursuant to 28 U. S. Code 509 and 10 to the Assistant Attorney General, who, in turn, has delegated it to the U. S. Attorneys in each district. It being the type of federal local relations or that kind of subject matter, this kind of delegation seems to make all kinds of sense. But that authority has been delegated and I can hand up to

the Court now copies of the authority if you would like it.

THE COURT: No. I am sure it follows the statute.

It will be filed?

MISS HARRIS: Yes, it will be filed.

THE COURT: I think that ends the matter.

MR. LEIGHTON: I think there is proper forum in New York State to adquately try Mr. Vancier for the crime charged in this very court.

MISS HARRIS: Your Honor, I think you are quite correct that that question is not before you.

There have been certification provisions in the Juvenile Act before; although not the Second Circuit, there are courts that have held that that particular certification was not reviewable by the district courts.

THE COURT: I don't think it is intended that I review it. That's the end of it. That is what I say.

Even if I agreed with you, and I won't go into it, but assuming that I agreed with you, I won't set aside the certification. I don't think that is the intent of Congress.

MR. LEIGHTON: Judge, without the certification, this Court would not have jurisdiction.

THE COURT: That's right.

MR. LEIGHTON: I think the defendant is entitled to attack the jurisdiction if he feels that there is improper jurisdiction of this Court.

THE COURT: He can attack the jurisdiction, but he can't do it by going behind the certification, so we needn't spend any more time on that. I am just as clear as I can be that that is what my ruling will be.

If I am wrong you know --

MR. LEIGHTON: I know, to go --

THE COURT: No, I don't mean that arbitrarily.

MR. LEIGHTON: -- up to the 17th floor. I know.

THE COURT: We have to settle this thing once and for all, let's say, anyway and I think, given a choice, this is the proper choice for me to make.

Now, that is not the end of it. The next question is, I say that after this certification is filed, I have jurisdiction, the Court has jurisdiction, and then the question is, do we impanel a jury.

I think the case made against a jury in this letter is about as complete and as good as you can find.

MR. LEIGHTON: Your Honor, the only argument I could make, then -- again I have to thank Miss Harris for the memorandum -- is that under the old section, the old section took the time, the space and the time to actually

say that there will be no jury trial in a juvenile proceeding; however, the new section is without that verbiage, and I think there the intent was to allow for a jury trial.

My argument or my request would be that your Honor does grant Mr. Vancier a trial by jury under the new section.

THE COURT: But there is no constitutional right to a trial by jury and there is nothing in the sparse legislative history to show that Congress intended to do anything more than give the juvenile his constitutional rights.

The quotation from Senator Bayh strikes me as pretty persuasive on that.

He says, "Decisions of the rights of the juvenile should be decided on a case-by-case basis under the Constitution."

So if I take him at his word, I am supposed to decide this on whether a defendant has a right to a jury under the Constitution. Clearly he doesn't.

Then he goes on to say, "For example, it has been that trial by jury is not constitutionally required in juvenile proceedings."

I have to conclude, frankly, without this letter

and the legislative history, I mean, the debate, the extract from the debates, when they eliminate that section, that provision for jury trial, I would certainly say it must have some significance, but I don't think it does.

MR. LEIGHTON: Judge, if you read some of the other sections contained in the letter, it seems that the juvenile is entitled to almost all other guarantees under the Constitution, but nowhere in the other section does it eliminate the guarantee to the right to a jury trial.

The Constitution provides a jury trial, it doesn't except from the group juveniles. That has been done by statute.

THE COURT: No. It does because it says that he is only entitled to a jury trial in criminal proceedings, and this is not going to be a criminal proceeding.

MR. LEIGHTON: Again, we are down to the question before the Anabel Torrez case whether or not, because a defendant can be incarcerated and sentenced to jail, whether or not this is a criminal proceeding.

THE COURT: Well, I know. I am not sure he can be sent to jail. He has to be sent to a special type of institution.

MR. LEIGHTON: Incarcerated. Let me withdraw that and say some sort of confinement.

THE COURT: Treatment and supervision.

I appreciate your coming over here and I certainly would be willing to hear you extensively, but I don't think there is much more to say.

We are riding on apparently a clean slate under the new act and I am faced with the choice of what to do and I think what we will do is we will have a non-jury trial in a proceeding under the new act. It is not a criminal proceeding.

Assuming that the certification is in proper form, and I'm sure it will be, and is filed by that time, then we will go on next Monday at 9:30.

MR. LEIGHTON: It is all right, Judge.

THE COURT: All right. Thank you.

MR. LEIGHTON: Will that be in this courtroom, Judge, do you know?

THE COURT: Yes, we will be in this courtroom. Thank you very much. Good night.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

VICTOR VANCIER,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.: New York

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 28th day of Feb 1975 at Federal Courthouse, Foley Square, N.Y.

deponent served the annexed Brief and Appendix for Appellant upon

Paul A. Curran , U.S. Attorney for the Souther District

the Attorney in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 28th day of Feb 1975

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975